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# Human Values in a Postmodern World

Steven L. Winter\*

More than forty years ago, Maurice Merleau-Ponty identified a philosophical fault line that continues to rumble through diverse contemporary debates. "Today," he proclaimed, "a humanism does not oppose religion with an explanation of the world. It begins by becoming aware of contingency."<sup>1</sup> In the current period of deconstruction and other postmodernisms, Merleau-Ponty's rejection and reconception of the Enlightenment idea of humanism has greater resonance than ever.<sup>2</sup> For many, it has become a postmodern truism that "the human condition" cannot be represented, described, or explained as just so many facts about the world. According to the now standard (if somewhat overstated) axiom of postmodernism, everything about humanity is socially contingent.

Reactions vary dramatically. For some, the recognition of contingency appears to open up conceptual space for transformative politics and radical social change. For others, however, the specter of contingency is radically destabilizing. Because they equate social contingency with the loss of foundations, they believe that social contingency leads inevitably from moral relativism to nihilism. For them, the logic of this trajectory is ineluctable. If everything is socially contingent, no social or moral system can claim greater validity than any other. And if all such systems are equally valid, then we are left with no reliable values, no moral standards, and no criteria of choice. The absence of sure foundations, they are convinced, means that we are left with an alarming and intolerable nihilism.<sup>3</sup>

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1. MAURICE MERLEAU-PONTY, *SIGNS* 241 (Richard C. McCleary trans., 1964) (lecture delivered September 10, 1951).

2. The questions of Merleau-Ponty's influence on and relationship to postmodernism are explored and debated in the essays collected in MAURICE MERLEAU-PONTY, *HERMENEUTICS, AND POSTMODERNISM* (Thomas W. Busch & Shaun Gallagher eds., 1992) [hereinafter *BUSCH & GALLAGHER*].

3. This is what Richard Bernstein calls the "Cartesian Anxiety." See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 16-18 (1983) ("Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos.").

Each of these reactions is mistaken, however, whatever the precise scope of the social contingency claim.<sup>4</sup> It is only a conceptual *trompe l'oeil* that makes social contingency appear emancipatory.<sup>5</sup> The lack of objective foundations does not translate into freedom from constraint; that would be true if and only if objective foundations were the sole form of constraint imaginable.<sup>6</sup> By the same token, there should be nothing disturbing in the recognition that the problem of moral choice has proven irreducible to a set of determinate principles or rules. It simply does not follow that we are unable to engage in moral judgment using the tools we *do* have. This is, after all, what we have been doing all along; indeed, it is what we did even when we believed in a universal Reason.<sup>7</sup>

The crucial point is that both poles of the opposition between freedom and determinacy assume the very same objectivist (that is, foundationalist) premises concerning what counts as constraint.<sup>8</sup> In this ironic way, many

4. Martha Nussbaum wants to know what position I hold on this question. In effect, she asks: Are there any values that, though internal to human history, are nevertheless necessary for any human society? Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J. L. & HUMAN. 197, 201 (1994). For an extended treatment of my view, see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989). Focusing as I do on the centrality to cognition of embodiment and imagination, my position on the extent of social contingency is sufficiently complex and unconventional that it does not admit of a simple answer. Because humans start from more or less the same set of embodied, basic-level experiences in constructing their physical, social, and moral worlds, a serious comparative study of values is likely to reveal a pattern of relative similarity. But one consequence of the role of imagination in human rationality is that elaborations are likely to differ across cultures with respect to specifics, content, framing, and degree of entrenchment. Accordingly, it seems unlikely to me that concentrating on basic human experiences such as embodiment, mortality, and the like will yield anything more than normative family resemblances. Indeed, Nussbaum's own account of such similarities is remarkably thin. See Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in THE QUALITY OF LIFE 242, 263-65 (Martha Nussbaum & Amartya Sen eds., 1993).

Let me give one example that is not merely a matter of different specifics (see *id.* at 256-57), but rather turns on differences of framing. All humans need to eat and to maintain bodily integrity in order to survive. But it is not at all clear that we can derive definite, universal norms from this fact. Fasting is a common religious practice, as self-flagellation once was. So, too, we are familiar with the power of the hunger strike as a tool of political struggle. There will be circumstances in which a committed adherent can give what will be, for her, cogent *reasons* for pursuing a course of conduct that to others seems aberrant and self-destructive. In such cases, we have a genuine instance of incommensurability of values—one that indulges neither the detachment from commitment nor the rhetorical strategies of “unrealistic goals” and “loaded dice” that Nussbaum here decries. See Nussbaum, *Valuing Values*, *supra*, at 206.

5. See STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 447-50 (1989).

6. See Winter, *supra* note 4, at 1107-13, 1117-29; cf. MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 229 (1990) (“[O]ne suspects that the retreat to subjectivism or skepticism betrays a residual commitment to metaphysical realism as the only form of truth worth having. . . .”); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 4-5 n.8 (1984) (“Nihilism is only a *partial* rejection of rationalism: The nihilist . . . would argue that a rational foundation is necessary to sustain values but that no such foundation exists or can be identified.”).

7. Cf. MERLEAU-PONTY, *supra* note 1, at 203 (“What is certain is that if there is some universal Reason we are not in on its secrets, and are in any case required to guide our lives according to our own lights.”).

8. For a discussion and critique of these shared underlying assumptions concerning reason, logic, and the nature of concepts, see Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L.

putative postmoderns who confidently believe that they have transcended foundationalism remain the unwitting victims of the droll paradox I like to call “antinomial capture.” But it is both possible and desirable to escape the distorting grip of these objectivist assumptions. To do so, we must radically rethink the concepts of contingency, relativism, nihilism, and the relationships between them.

My perhaps controversial claim is this: More than anything else, it is this reconfigured understanding that characterizes the “postmodern.” Postmodernism is conventionally identified with more familiar tenets such as the rejection of meta-narratives and the deconstruction of meaning. But to focus on these particular elements in isolation distorts postmodernism, leading to the mistaken conclusion that postmodernism is just a form of radical skepticism. In contrast, as I have argued previously, these claims must be understood *en ensemble* with the postmodern decentering of the self.<sup>9</sup> So viewed, postmodernism’s most profound contribution is its radical insistence on contingency.<sup>10</sup>

In this essay, I say something about the origins, nature, and consequences of this postmodern understanding of contingency. In particular, I argue that this postmodern reconception changes fundamentally the way we think about the problem of values. Paradoxically, my argument is that postmodernism does not undermine values at all, but instead reinvigorates our understanding of their deeply human dimension. Values are not to be found elsewhere, outside ourselves and our practices; they are profoundly human products made real by human action. Social contingency, therefore, is the precondition for truth—not its enemy. As Merleau-Ponty observes, “whatever truth we may have is to be gotten not in spite of but through our historical inherence.”<sup>11</sup>

This insight both undermines and overturns the logical trajectory that supposedly runs from relativism to nihilism. Indeed, from this perspective, the relations between relativism and objectivism are virtually inverted. Once contingency and historicity are understood as the prerequisites for the

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REV. 635, 649-61 (1990), and Winter, *supra* note 4, at 1117-59. The basic point about the hidden complicity between objectivism and subjectivism was made by Merleau-Ponty as early as 1945 when his *Phenomenology of Perception* first appeared. See MAURICE MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* 39 (Colin Smith trans., 1962) (“We pass from absolute objectivity to absolute subjectivity, but this second idea is no better than the first and is upheld only against it, which means by it. The affinity between intellectualism [i.e., idealism] and empiricism [i.e., objectivism] is thus much less obvious and much more deeply rooted than is commonly thought.”). It is only recently that this insight and its implications have begun to take on something of the status of conventional wisdom. See, e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 854 n.281 (1994); Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1562-63 (1991).

9. Steven L. Winter, *For What It's Worth*, 26 L. & SOC'Y REV. 789, 793-99 (1992).

10. See *id.* at 797-98, 811-12; see also Hugh J. Silverman, *Between Merleau-Ponty and Postmodernism*, in BUSCH & GALLAGHER, *supra* note 2, at 143 (“Deconstruction does not deny grounds, reasons, intelligibles, or the like. Rather it *situates* them.”) (emphasis added).

11. MERLEAU-PONTY, *supra* note 1, at 109.

only sort of values and knowledge we can have, it becomes clear that it is the desire for the unattainable surety of objective foundations—and not relativism—that creates the problem of nihilism. Nihilism thus stands unmasked as just another artificial construct of foundationalism. Relativism appears less a problem to be avoided than an inevitable—indeed, indispensable—aspect of human adaptation. The obsession with objective foundations, in contrast, looms as both nihilist and deeply antihumanist.

If there is irony in this reversal, it is fully intended. To appreciate its logic, one must first understand how we came to the condition that many identify as postmodernity.

One highly conventional view—associated with Lyotard, among others—is that the postmodern is the logical outgrowth or extension of the modern.<sup>12</sup> This view is consistent with a standard history in which the genesis of modernity lies in the conflict between reason and religion. On this familiar account, religious belief is seen as a prejudice to be overcome because it is an obstacle to true and accurate knowledge about the world. Accordingly, modern science begins with a healthy distrust of received dogma and an insistence on reason and empirical proof. Applied to the domain of values, however, the skepticism introduced by modern science and the attendant processes of secularization proves corrosive. In the absence of some empirical truth about human nature or some transcendental realm of moral reality, there is no indubitable source for securing our most cherished moral values from a disabling skepticism. The loss of faith occasioned by science and secularization threatens a loss of sure foundations. Science emerges as the only plausible candidate for truth because of its ability to confirm itself through its own performative success.<sup>13</sup> With nothing else to secure moral justification, diverse or conflicting social practices seem to stand beyond rational approval or condemnation.<sup>14</sup>

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12. As Lyotard explains it, postmodernism

is undoubtedly a part of the modern. All that has been received, if only yesterday (*modo, modo*, Petronious used to say), must be suspected. What space does Cézanne challenge? The Impressionists'. What object do Picasso and Braque attack? Cézanne's. What presupposition does Duchamp break with in 1912? That which says [if] one must make a painting, [make] it cubist. And Buren questions the other presupposition which he believes had survived untouched by the work of Duchamp: the place of presentation of the work. In an amazing acceleration, the generations precipitate themselves. A work can become modern only if it is first postmodern. Postmodernism thus understood is not modernism at its end but in the nascent state, and this state is constant.

JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 79 (Geoff Bennington and Brian Massumi trans., 1984). For an expression of the standard view and its relation to postmodernism, see J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1988-89 (1992).

13. See LYOTARD, *supra* note 12, at 46 ("But the fact remains that since performativity increases the ability to produce proof, it also increases the ability to be right: the technical criterion, introduced on a massive scale into scientific knowledge, cannot fail to influence the truth criterion."). On the double sense in which Lyotard uses the term "performative," see *id.* at 88 n.30.

14. Cf. MERLEAU-PONTY, *supra* note 1, at 198 ("Skepticism has two sides. It means that nothing is true, but also that nothing is false. It rejects *all* opinions and *all* behavior as absurd, but it thereby

Relativism appears identical to nihilism. Postmodernism—with its rejection of meta-narratives, deconstruction of meaning, and decentering of the self—looks like a radicalized version of skepticism that threatens a frightening descent into intellectual and moral chaos.

In his *Sources of the Self*, Charles Taylor offers a different account of modernity that in turn suggests a different explanation of our current situation. Taylor diagnoses the crisis of modernity as arising not from the loss, but from the *expansion* of moral sources.<sup>15</sup> Where theism had previously dominated, the eighteenth century witnesses the emergence of two alternative moral sources that, in a variety of ways, continue to define our contemporary situation.<sup>16</sup> The first alternative is the notion of the dignity inherent in some conception of essential human capacities, either rational agency or expressive subjectivity. The other is a conception of nature as a beneficent order accessible either through reason or, in the case of Romanticism, as it is reflected in human feelings and perceptions.<sup>17</sup>

According to Taylor, therefore, the crisis of modernity is precipitated not by the loss of foundations, but by a twofold loss of confidence in their efficacy. First, the multiplicity of available moral sources leads to a loss of certainty because the very existence of each alternative problematizes its rivals.<sup>18</sup> Second, and more importantly, the newly available moral sources suffer an inherent instability not pertinent to theism. While religion is always vulnerable to the skeptical challenge as to truth, its acceptance at least provides a self-sufficient ground for morality. In contrast, the alternative moral sources of dignity and nature are subject to skeptical challenges with respect to both validity *and* sufficiency. As Taylor remarks:

[W]hereas faith can be questioned as to its truth, dignity and nature are also called into question in respect to their adequacy if true. The nagging question for modern theism is simply: Is there really a God? The threat at the margin of modern non-theistic humanism is: So what?<sup>19</sup>

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deprives us of the means of rejecting any one as false.”).

15. As Taylor explains this unconventional claim:

Our forebears were generally unruffled in their belief, because the sources they could envisage made unbelief incredible. The big thing that has happened since is the opening of other possible sources. In a predicament where these are plural, a lot of things look problematic that didn't before—and not just the existence of God, but also such “unquestionable” ethical principles as that reason ought to govern the passions.

CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 313 (1989).

16. *Id.* at 314.

17. *Id.* at 314–15.

18. *Id.* at 317 (“Modern moral culture is one of multiple sources. . . . The fact that the directions are multiple contributes to our sense of uncertainty. . . . We might say that all positions are problematized by the fact that they exist in a field of alternatives.”).

19. *Id.* Taylor points out that the skeptical challenge to the sufficiency of these moral sources also entails the further question of their content:

One way to characterize the further difficulty that afflicts these alternative moral sources is to say that they are increasingly susceptible to “disenchantment,” or the loss of transcendental status.

Like the standard history, this much of Taylor’s account locates the roots of contemporary anxiety over relativism and nihilism in the intellectual transformations wrought by the Enlightenment. But this surface similarity should not obscure the more profound differences. The shift of explanatory focus from the loss of foundations to the expansion of moral sources requires comparable changes in our idea of “foundations.” This in turn will oblige us to revise our conceptions of nihilism and relativism, along with our understanding of postmodernism. To see why, we must first consider both the way in which Taylor’s account creates a problem with respect to causation and the manner in which he responds to it.

The standard version of the Enlightenment comes equipped with its own internal logic as a story about the advancement of reason and knowledge. Taylor’s revision of the standard history correspondingly alters the nature of the causal account that must be given: “[T]he issue shifts from the removal of blinkers to the question of how these new sources become available.”<sup>20</sup> For those who have not yet escaped objectivist premises, the “availability” issue will not seem to be a problem at all. It will seem self-evident to them that, in the absence of foundations, there simply are no constraints on the possible sources of values, aside, perhaps, from the limits of human imagination. But Taylor specifically rejects any idealist account.<sup>21</sup> Instead he insists that “it’s obvious that availability here can’t mean that another quite different position is logically conceivable or even that it is there in the tradition. In this sense, a range of pagan views, those of the ancient philosophers, were ‘available’ through most of the mediaeval and early modern periods.”<sup>22</sup>

For Taylor, therefore, the crux of any explanation of what causes new moral sources to emerge in the eighteenth century—or, for that matter, at any subsequent historical moment—must be located in the reflexive (he calls it “circular”) relationship between socio-economic developments and moral culture.<sup>23</sup> For a new moral source to become “available,” it must

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The challenge of inadequacy calls forth the continually renewed attempts to define what the dignity that inheres in us as rational or expressive beings, or the good involved in our immersion in nature, consists in. This, and not just the predicament of rivalry and contestation, is what makes modern moral outlooks so tentative. . . .

*Id.* at 317-18.

20. *Id.* at 313.

21. *Id.* at 199; *see also id.* at 306 (“No one really thinks that disengagement entered the culture from the pen of Descartes, or individualism from that of Locke.”).

22. *Id.* at 313.

23. *Id.* at 306.

“capture the spirit of a certain unreflecting practice.”<sup>24</sup> Changes in ways of life and their attendant practices, routines, and behaviors alter people’s perception and understanding of what it means to live a good life.<sup>25</sup> New moral theories contribute to this process by thematizing, rationalizing, and providing philosophical warrant for these emerging “life goods.”<sup>26</sup> For a new moral source to be perceived as compelling, therefore, it must make sense of the modes of life that have come to dominate a given period. The new moral sources of dignity and nature emerge in the eighteenth century because, according to Taylor, they simultaneously illuminate and advance contemporaneous social developments.<sup>27</sup>

Taylor’s dialectical account is important in a number of ways, not least of which is its nuanced conception of contingency. One familiar sense of “contingency” expresses the idea of accident, uncertainty, and unpredictability—what Merleau-Ponty describes as “the idea of a fundamental element of chance in history.”<sup>28</sup> Taylor assumes an important role for this conception of contingency. In his account, the emergence of new moral

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24. *Id.* at 308. As Taylor explains:

[M]oral ideals . . . for the most part exist in our lives through being embedded in practices. By ‘practices’ I mean . . . more or less any stable configuration of shared activity, whose shape is defined by a certain pattern of dos and don’ts. . . . The way we discipline our children, greet each other in the street, determine group decisions through voting in elections, and exchange things through markets are all practices. . . .

The basic relation is that ideas articulate practices. . . . That is, the ideas frequently arise from attempts to formulate and bring to some conscious expression the underlying rationale of the pattern. . . . A pattern can exist just in the dos and don’ts that people accept and mutually enforce, without there being (yet) an explicit rationale. And as children, we learn some of the most fundamental patterns at first just as such. The articulations come later.

*Id.* at 204.

25. *See id.* at 307 (“In a broad movement of culture, we see emerging new notions of and sense of the good life: for instance, the close, loving family, or the expression of feeling, or the ideals of benevolence.”).

26. *Id.* at 92-93, 307; *cf.* NUSSBAUM, *supra* note 6, at 224 (“Philosophy justifies a belief . . . by perspicuously showing its depth and centrality in our lives.”).

27. Taylor identifies some of the relevant developments and the mutually reinforcing nature of the reflexive dynamic:

In some way, the very success of the new theologies and neo-Stoic philosophy in bringing some stable order to the lives of important milieus in European society, along with the changes to more effective economic and administrative practices—such as agricultural improvements, better-disciplined armies, more effective social control—all helped to accredit the sense of living in a well-regulated interlocking order, to which humans are attuned by their natural endowments, and in which the pursuance of the ends of ordinary life through instrumental reason plays a central part. . . . But . . . [t]he relationship is plainly circular. . . . That is, elements of the culture were constitutive to the developments—as, e.g., individual autonomy was for the new forms of economic enterprise and political authority—while in return these elements were entrenched and propagated by the forward march of these developments.

TAYLOR, *supra* note 15, at 306.

28. MERLEAU-PONTY, *supra* note 1, at 218. No doubt, it is this sense in which “contingency” is understood in opposition to “necessary” or “determined” that contributes to the equation of “social contingency” with “arbitrariness” and “indeterminacy.”



sources is made possible by more or less fortuitous changes in socio-economic practices.<sup>29</sup>

At the same time, however, there is implicit in this “made possible” another, very different connotation of “contingent” as dependent or conditional.<sup>30</sup> For Taylor, the evolution and articulation of new moral sources is socially contingent in the sense that they are *contingent on* these socio-economic developments. Cultural conditions and practices serve as the grounding experiences that enable, structure, and constitute the advent of new moral sources. So understood, the most significant feature of Taylor’s account is that it recasts contingency in a *foundational* role.

This idea of contingency as foundational is not only different than that of “foundations” in the objectivist sense, it is irreconcilable with it. In the first place, Taylor’s insistence on a reflexive relationship between moral sources and cultural practices rules out the kind of fixed, unilinear relation between base and superstructure characteristic of more traditional notions of foundations.<sup>31</sup> Moreover, the idea of contingency implies some range of non-arbitrary possibilities open to development as opposed to an essential or necessary relation.<sup>32</sup> (To this extent, this connotation of contingency retains some of its traditional, analytic meaning as standing in opposition to necessity.) This is well illustrated in the paradigm case examined by Taylor. The forms of life that develop in the eighteenth century in fact support three alternative conceptions of moral sources. At the same time, however, the very idea of a reflexive relationship between moral sources and forms of life presupposes that ideas and practices exist

29. See TAYLOR, *supra* note 15, at 206 (“The modern identity arose because changes in the self-understandings connected with a wide range of practices—religious, political, economic, familial, intellectual, artistic—converged and reinforced each other to produce it. . .”).

30. The Oxford English Dictionary, for example, gives this sense of “contingent” as: “Dependent for its occurrence or character *on* or *upon* some prior occurrence or condition.” III THE OXFORD ENGLISH DICTIONARY 825 (2d ed. 1989) (definition 8) [hereinafter OED]. This is related to the sense in which we speak of a “contingency fund,” a “contingency plan,” or a “contingency clause” in a contract. See *id.* at 826 (definition 9). This later usage combines both connotations; in this sense, a contingency is “[a] thing or condition of things contingent or dependent upon an uncertain event.” *Id.* at 825 (definition 6). Note that in this usage, “contingency” connotes both uncertainty *and* determinacy, i.e., an uncertain event the occurrence of which will determine subsequent action.

31. See TAYLOR, *supra* note 15, at 306.

32. Cf. MAURICE MERLEAU-PONTY, IN PRAISE OF PHILOSOPHY AND OTHER ESSAYS 112 (John Wild et al. trans., 1963):

Now this working of the past against the present does not culminate in a closed universal history or a complete system of all the possible human combinations. . . . Rather, it produces a table of diverse, complex probabilities, always bound to local circumstance [and] weighted with a coefficient of facticity.

For elaborations of this conception—what I call “nondeterminacy”—in which humanly constructed meanings are not determinate, but are nevertheless framed and constrained by the systematic nature of the cognitive processes, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989); and Winter, *supra* note 4.

in relations of (mutual) constraint.<sup>33</sup> Every moral theory is *not* as good as every other, given a certain form of life. Thus, not every traditional or logically conceivable moral vision would be meaningful or capable of application within the social conditions of modernity.<sup>34</sup>

For those who identify postmodernism with anti-essentialism and anti-foundationalism, this idea of contingency as constraint and foundation may seem counterintuitive—indeed, scarcely “postmodern.” I want to insist, however, that this reconception of contingency is essential to any understanding of the postmodern. Perhaps the most distinguishing characteristic of postmodernism—and its most significant contribution—is not that it radicalizes skepticism, but rather that it radicalizes our concept of constraints.

Consider the familiar aspect of postmodernism that many find so threatening: the attempt to decenter the conventional conception of the self as an originary, autonomous agent by stressing its dependence on the conventional systems of signification.<sup>35</sup> The whole point of this gambit is to explode the subject’s sense of self as the self-directing author of its practices and expose the subject as but a contingent incident of those

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33. Strictly speaking, there can be no logical or temporal priority as between the grounding in cultural practices and the interpretive frameworks that contribute to those experiences. From a diachronic standpoint, this presents a chicken-and-egg problem. But in terms of one’s synchronic ongoing experience, it is a dynamic, reflexive, and concurrent process that might best be described as an “epistemological ecology.” See Winter, *Indeterminacy and Incommensurability*, *supra* note 32, at 1486.

There is, however, an important sense in which the grounding experiences do have priority: for each of us as individuals, meaning arises in the imaginative interaction with a physical and social environment that is already formed by the actions of those who have preceded us. See MAURICE MERLEAU-PONTY, *SENSE AND NON-SENSE* 131 (Hubert L. & Patricia A. Dreyfus trans., 1964) (“The spirit of a society is realized, transmitted, and perceived through the cultural objects which it bestows upon itself and in the midst of which it lives. It is there that the deposit of its practical categories is built up, and these categories in turn suggest a way of thinking to man.”). Reflecting a common Hegelian influence, Taylor seems to agree. See TAYLOR, *supra* note 15, at 204, *quoted in* note 24, *supra*. But Taylor self-consciously struggles against a tendency to stress the ideational components of cultural development. See *id.* at 199-207, 305-20.

34. As Bernard Williams observes:

Many outlooks that human beings have had are not real options for us now. The life of a Bronze Age chief or a medieval samurai are not real options for us: there is no way of living them. . . . Even utopian projects among a small band of enthusiasts could not reproduce *that* life. Still more, the project of reenacting it on a social scale in the context of modern industrial life would involve a vast social illusion. The prospect of removing the conditions of modern industrial life altogether is . . . another, though different, impossibility.

BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 161 (1985).

35. See, e.g., JACQUES DERRIDA, *LIMITED INC* (Samuel Weber trans., 1988).

ongoing practices.<sup>36</sup> One of the principal lessons of postmodernism is that to be a "subject" is always to be subject to multiple forms of constraint.<sup>37</sup>

Taylor's account is helpful here because it illuminates how the postmodern condition can actually be a matter of the multiplicity of constraints or the proliferation of sources. As I have suggested previously, the whole question of foundations looks quite different once one lays rationalist presuppositions aside: from a postmodern perspective, the predicament is not that there are no foundations but that there are too many.<sup>38</sup> Thus, students of postmodernity have emphasized the increasing heterogeneity of language games, the greater mobility of the players, and the way in which conflicting perspectives are embedded in different aspects of our lives and activities.<sup>39</sup> It is the resulting profusion of meaning—and not the "free" play, indeterminacy, or radical subjectivity thought to arise from a loss of foundations—that leads to the problems of interpretability and undecidability so emphasized by postmodernists.

Taylor's account is also helpful because it illuminates the twofold nature of the process that culminates in Lyotard's famous definition of postmod-

36. See Winter, *supra* note 9, at 795-97. The tendency to misread postmodernism as promoting or endorsing radical subjectivism is as unfortunate as it is common. This mistake is conspicuous in Taylor, who otherwise is such a careful and sensitive reader. Thus, he misreads Derrida as celebrating "the prodigious power of subjectivity to undo all the potential allegiances which might bind it; pure untrammelled freedom" and similarly (and quite mysteriously, see *infra* note 37) finds "striking" in Foucault a "kind of unrestrained, utterly self-related freedom. . . ." TAYLOR, *supra* note 15, at 489. Much the same is true of Martha Nussbaum's misreading of Derrida and Fish on this point. See NUSSBAUM, *supra* note 6, at 224-25. The misperception is at least mitigated in the case of Stanley Fish, whose texts contain an inherent ambiguity that seems to invite this particular misreading. See Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987) (arguing that this ambiguity is built into Fish's texts).

37. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-77*, at 131 (Colin Gordon ed., 1980) ("Truth is a thing of this world; it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power."); Jamie Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 COLO. L. REV. 489, 503 (1991) ("[P]ostmodernism . . . suggests there is no 'beyond.' There is no place outside the forms, no art that could break free from the restraint in which it is, for the moment, embedded.").

38. Steven L. Winter, *Without Privilege*, 139 U. PA. L. REV. 1063, 1068 (1991); cf. Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 16 (1983) ("It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance.").

39. See LYOTARD, *supra* note 12, at xxiv-xxv, 10, 15, 66-67; Balkin, *supra* note 12, at 1972. As Taylor observes, "the individual has been taken out of a rich community life and now enters instead into a series of mobile, changing, revocable associations. . . . We end up relating to each other through a series of partial roles." TAYLOR, *supra* note 15, at 502. For a thoughtful discussion of this phenomenon and its impact on family law, see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 69-76 (1993).

To test the point in one's own life, consider the abrupt shifts in attitude, demeanor, and interactions (not to mention identity and community) that take place as one moves from office to gym to local bar. On a larger scale, consider the very different forms of life, anticipated life goods, and associated virtues that characterize the world of a: (1) young, urban, upwardly mobile professional; (2) middle-aged, middle-class suburbanite; (3) blue-collar worker; (4) inner-city resident; or (5) self-employed small businessperson. Now consider the ease with which one moves from "yuppie" to suburbanite or the way in which the lifeworlds of inner-city residents and local business owners constantly impinge on and clash with one another.

ernism as “incredulity toward metanarratives.”<sup>40</sup> The loss of transcendence is not just a matter of progressive skepticism, but follows inexorably from the recognition of contingency. Taylor’s piercing “So what?” is not a denial of reason or nature, but a loss of faith in their explanatory power. Thus, for Merleau-Ponty, the reconception of humanism as awareness of contingency entails “the methodical refusal of explanations, because they destroy the mixture we are made of and make us incomprehensible to ourselves.”<sup>41</sup>

I want to pause on this point for a moment. It is easy to see why someone who believes that everything about humanity is socially contingent would conclude that neither nature nor reason can be used to generate justifications or explanations of social life. But it may seem counterintuitive that those, like Merleau-Ponty,<sup>42</sup> who believe that our very embodiment is central to our constitution would reach the same conclusion. The paradox, however, is only apparent—a product of antinomial capture. For people still ensnared in residual objectivist assumptions, any mention of embodiment is easily mistaken for an old-fashioned foundationalism because it seems to offer the Archimedean point upon which to rest a system of justification. In fact, just the opposite is true; our embodiment is the very locus of our contingency. There can be no possibility of transcendence when our very ability to have a world is contingent on the kinds of bodies that we have and the ways in which those bodies interact with our physical and social environment.<sup>43</sup> As Martha Nussbaum points out, “the importance of context and particularity for us

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40. LYOTARD, *supra* note 12, at xxiv (“Simplifying to the extreme, I define *postmodern* as incredulity toward metanarratives.”). By “metanarrative,” Lyotard means any legitimating metadiscourse “such as the dialectics of Spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth.” *Id.* at xxiii. Thus, although “incredulity” implies skepticism, the way in which Lyotard defines “metanarrative” makes clear that what the postmodern rejects is not just the truth of any particular meta-narrative, but also the very idea of a meta-narrative as a transcendent justification.

41. MERLEAU-PONTY, *supra* note 1, at 241.

42. See MERLEAU-PONTY, *supra* note 8, at 440-41:

In so far as I have hands, feet, a body, I sustain around me intentions which are not dependent on my decisions and which affect my surroundings in ways I do not choose. These intentions are general . . . in the sense that they are not simply mine, they originate from other than myself, and I am not surprised to find them in all psycho-physical subjects organized as I am. . . . Without the [spontaneous evaluations given by our embodied perceptual capacities], we would not have a world, that is a collection of things which emerge from a background of formlessness by presenting themselves to our body as ‘to be touched,’ ‘to be taken,’ ‘to be climbed over.’

43. See *id.* at xiii (“[W]e are through and through compounded of relationships with the world.”). As Dreyfus and Rabinow point out, Merleau-Ponty’s phenomenological conception of the role of embodiment is quite general and does not say anything about the historical elaborations of those embodied structures. HUBERT L. DREYFUS AND PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 111-12 (2d ed. 1983). Recent work in cognitive theory, in contrast, provides quite specific accounts of the role of embodiment and of the way in which different cultural and historical elaborations of meaning develop from those embodied structures. See GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987); MARK JOHNSON, THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON (1987); Winter, *supra* note 4, at 1129-59.

as we are is inseparable from the fact that we are bodily finite beings of a particular sort, beings who go through time in a particular way.”<sup>44</sup> Because we cannot escape embodiment, we cannot evade time and existence. We are embodied *in* a field of social interaction that is both our formative context and our own ongoing production. For us, there can be no transcendence of the contingent social contexts that are, simultaneously, both constitutive of the self and the field of action in which the self is always already implicated as a responsible actor.

The recognition of this ineradicable situatedness both deepens and transforms our understanding of contingency. We are contingent beings in the literal sense of the original Latin *contingentem*—“touching on all sides.”<sup>45</sup> We are enmeshed in contingency; we are inextricable from it. It is this all-pervasive quality—this sense of total suffusion—that defines the postmodern. Thus, it is quintessentially *modern* to treat constraint as something to be overcome or transcended.<sup>46</sup> In contrast, it is characteristically *postmodern* to understand that constraints cannot be avoided because they provide the enabling conditions of possibility.<sup>47</sup>

On this understanding, there can be no question of nihilism. Social contingency does not threaten the possibility of foundations or truth; it is their prerequisite.

Superficially considered, our inherence destroys all truth; considered radically, it founds a new idea of truth. As long as I cling to the ideal of an absolute spectator, of knowledge with no point of view, I can see my situation as nothing but a source of error. But if I have once recognized that . . . [history] contains everything which can *exist* for me, then my contact with the social in the finitude of my situation is

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44. NUSSBAUM, *supra* note 6, at 391.

45. OED, *supra* note 30, at 825.

46. See Balkin, *supra* note 12, at 1988-89.

47. For just this reason, Nussbaum is wrong to read Fish and his postmodern cohorts as affecting either a detachment from commitment or a divestiture of the human—including the disposition to ethical judgment. Nussbaum, *Valuing Values*, *supra* note 4, at 204-06. Herrnstein Smith's stated position is virtually indistinguishable from the claim that Nussbaum makes here. See Barbara H. Smith, *The Unquiet Judge: Activism without Objectivism in Law and Politics*, 9 ANNALS OF SCHOLARSHIP 111, 117 (1992) (“It is possible, of course, to defend and promote judgments made on behalf of subordinated people with effective *non-objectivist* arguments. But that is just the possibility that [Robin] West, like many other politically concerned objectivists, fails to grasp.”). And, whether one finds it persuasive or not, Derrida clearly conceives of his project as an ethical one. See, e.g., Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919, 935 (1990) (seeking “to show why and how what is now called Deconstruction, while seeming not to ‘address’ the problem of justice, has done nothing but address it, if only obliquely, unable to do so directly.”). Far from denying or suspending commitment, as Nussbaum suggests, Fish concludes his *Anti-Professionalism* essay by arguing that to recognize the contingency of one's world and one's values “will in no way render that world any less perspicuous or those values any less compelling.” FISH, *supra* note 5, at 245-46; see also *id.* at 467 (“being situated . . . [means] that one's beliefs do not relax their hold because one ‘knows’ that they are local and not universal.”).

revealed to me as the point of origin of all truth, including scientific truth.<sup>48</sup>

Martha Nussbaum and Charles Taylor both agree that Nietzsche “did have a real point” when he suggested that the traditional, foundational approach to morality engenders in humanity a crippling sense of worthlessness and a poisonous self-hatred.<sup>49</sup> In fact, Nietzsche went further and described it as a “fatality” which, appropriately enough, he identified as “nihilism.”<sup>50</sup> For the problem of nihilism arises only if one demands some more secure and objective foundation than our own contingent humanity. It is, thus, the insistence on the objective and the absolute that is both nihilist and profoundly antihumanist.

A true humanism, as Merleau-Ponty suggests, affirms that our values need not be underwritten by anything more than our own contingent actions. To the contrary: “What is perhaps proper to our time is to disassociate humanism from the idea of a humanity fully guaranteed by natural law, and not only reconcile consciousness of human values and consciousness of the infrastructures which keep them in existence, but to insist on their inseparability.”<sup>51</sup> In other words, the promise of human values in a postmodern world is a matter of our interpretive capacity to reappropriate and revalue our attitude toward the “human.”

But, someone will quickly point out, this still leaves us with the problem of relativism. How are we to criticize and reject social institutions such as slavery or the subordination of women if there are no objective criteria of moral judgment, no universal bases for moral values?<sup>52</sup> This is the intended import of Martha Nussbaum’s second story about the three

48. MERLEAU-PONTY, *supra* note 1, at 109. Merleau-Ponty makes much the same point with respect to skepticism:

The critique of human understanding destroys it only if we cling to the idea of a complete or absolute understanding. If on the contrary we rid ourselves of this idea, then thought in act, as the only possible thought, becomes the measure of all things and the equivalent of an absolute. . . . At this moment, reasons for doubting become reasons for believing. The only effect of our whole critique is to make our passions and opinions more precious by making us see that they are our only recourse, and that we do not understand our own selves by dreaming of something different. Then we find the fixed point we need (if we want to bring our versatility to a stop) . . . in the fact that there is opinion, the appearance of the good and the true.

*Id.* at 206.

49. See NUSSBAUM, *supra* note 6, at 229, 370, 380; TAYLOR, *supra* note 15, at 453.

50. “Here precisely is what has become a fatality for Europe—together with the fear of man we have also lost our love of him, our reverence for him, our hopes for him, even the will to him. The sight of man now makes us weary—what is nihilism if it is not *that*?—We are weary of *man*.” FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS AND ECCE HOMO, Essay I, § 12 (Walter Kaufmann trans., 1967).

51. MERLEAU-PONTY, *supra* note 1, at 226; see also FISH, *supra* note 5, at 239 (“[W]ithout some institutionally articulated spaces in which actions become possible and judgments become inevitable (because they are obligatory), there would be nothing to do and no values to support.”).

52. In its most vulgar—though highly conventional—form, this concern is expressed in the fear that relativism leads to Nazism. It is this concern that lies behind the *ad hominem* arguments that not so long ago sought to discredit deconstruction and continental philosophy by pointing out that de Man and Heidegger were Nazis.

philosophers from developing countries who felt it necessary to invoke "the abstract ethical language of rights, justice, equality, and personhood" in order to develop and support their feminist positions.<sup>53</sup> Similarly, Anthony Cook expresses his concern that John Dewey's faith in democracy and critical intelligence will be inadequate as a basis for meaningful normative prescription. He worries that if actions are "evaluated by reference to human values based in human experience, dissension will persist."<sup>54</sup>

These are powerful concerns. So powerful, in fact, that their mere invocation has frequently proven sufficient to stifle moral and intellectual inquiry.<sup>55</sup> Nonetheless, they are seriously misplaced. First, we do not disarm ourselves against evil by relinquishing our devotion to some set of objective moral standards that remains forever elusive and unknown.<sup>56</sup> To eschew such standards leaves us exactly where we are, with all the resources of moral deliberation that constitute us and our traditions.<sup>57</sup>

More importantly, there is real moral danger in succumbing to these anxieties. Sincere belief in moral sources of the most transcendent kind has never provided the least guarantee against oppression. By this I do not mean simply that humans are perfectly capable of perpetrating atrocities in the face of the most hallowed and widely accepted moral proscriptions (although, for those who place their faith in external limits, that should be sobering enough). Rather, I mean that as a historical matter, transcendent moral values have themselves been developed and deployed in order to sustain precisely those practices that we now want most to condemn. This is obviously true in the case of gender relations; for much of history, the subordination of women was justified in terms of the seemingly undeniable natural order of things.<sup>58</sup>

53. Nussbaum, *Valuing Values*, *supra* note 4, at 198.

54. Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence* 41 (1992) (unpublished manuscript, on file with the author).

55. For an account of how this played out in the 1930s and the effects it had on Pragmatism and Legal Realism, see EDWARD PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

56. Lyotard, for instance, has made this point: "Most people have lost the nostalgia for the lost narrative. It in no way follows that they are reduced to barbarity. What saves them from it is their knowledge that legitimation can only spring from their own linguistic practice and communicational interaction." LYOTARD, *supra* note 12, at 41.

57. Cf. ALASDAIR MACINTYRE, *Postscript to the Second Edition*, in *AFTER VIRTUE* 265-66 (2d ed. 1984) ("Morality which is no particular society's morality is to be found nowhere."); Winter, *supra* note 8, at 692-93 ("The tools with which we start must always be what we take as the best of the moral traditions of our culture. But it is never the tools that do the job; morality, like art, is the work of the imagination."); see also MARK JOHNSON, *MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS* 12 (1993).

58. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and

The point is yet more stark with respect to slavery. If Richard Tuck is correct, the concept of natural rights was first introduced by moral and political theorists of the sixteenth and seventeenth centuries in order to justify the institution of slavery as it then flourished in Spain, Portugal, and the Netherlands.<sup>59</sup> While this may seem counterintuitive, Tuck provides a quite cogent explanation. Those within the civic humanist tradition understood law as designed by humans for common utility. This position, however, made it difficult to accept or justify slavery as a *legal* institution because to do so meant assuming responsibility for it. Those in the natural rights tradition, in contrast, were free to argue "that free men were free (among other things) to enslave themselves *ad libitum* and unconditionally."<sup>60</sup>

Much the same paradox arises with respect to the usefulness and consequences of depending upon transcendent normative frameworks for resolving moral disagreement. Consensus is not the natural order of the moral universe; the desire to hold "the mirror of critical objectivity to meaning" is, as Robert Cover admonishes us, what leads to the "imperial mode of world maintenance."<sup>61</sup> The potential price of such consensus, moreover, is far too steep. If any moral system were so effective as to be capable of preventing dissension, it would also run the much more serious risk of cutting off moral development. For, in the absence of access to some transcendent source, the plurality of values and practices characteristically available within<sup>62</sup> or across cultural boundaries is an indispensable source for moral adaptation and growth.<sup>63</sup>

This, I think, is the real lesson of Martha Nussbaum's second story. Once we relinquish the notion of transcendent moral sources, we are compelled to recognize that all of our putatively "universal" and "abstract"

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benign offices of wife and mother."). Later the idea was to be given more scientific dress in Freud's infamous "biology is destiny."

59. RICHARD TUCK, *NATURAL RIGHTS THEORIES* 49-57 (1979). Tuck notes: "An important conclusion to which one is forcibly led is that most strong rights theories have in fact been explicitly authoritarian rather than liberal. . . . Selden's followers and Hobbes all openly endorsed such institutions as slavery and the absolutist state." *Id.* at 3.

60. *Id.* at 49. Notions of inalienable rights developed later in response. *See id.* at 143-55.

61. *See* Cover, *supra* note 38, at 16 ("The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease."); *see also id.* at 68 ("We ought to stop circumscribing the *nomos*; we ought to invite new worlds.").

62. *See* Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 965, 996-98 (1991) ("[T]he existence of slippage [in cultural learning and reproduction] will mean that community is necessarily a relative phenomenon characterized by degrees of plurality and divergence.").

63. *See* ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 364-65 (1988); Margaret Jane Radin and Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1023, 1042 (1991) ("Slippage instigates the evolutionary rise, in sharply differentiating social environments, of epistemic plurality."); *cf.* Nussbaum, *Non-Relative Virtues*, *supra* note 4, at 262 ("A traditional society, confronted with new technologies and sciences, and the conceptions that go with them . . . assesses the new item as a possible contributor to flourishing life, making it comprehensible to itself, and incorporating elements that promise to solve problems of flourishing.").



normative values—including the liberal Western conceptions of rights, justice, equality, and personhood—are themselves the contingent, historical products of particular traditions.<sup>64</sup> Thus, when Nussbaum's Third World colleagues invoked these humanist values in their struggles against the gender oppression of their traditional cultures, they were able to do so only because such "abstract" values had been produced elsewhere through the divergent processes of cultural development. In short, these liberal Western conceptions would not have been available to them but for the multiplicity of culturally relative, contingent moral values.<sup>65</sup> The relativism of human moral systems can thus be seen as an adaptive mechanism essential to any human (which is to say fallible) normative enterprise. We have no reason to want to bring our moral versatility to a stop, and much reason to carry on with it.

The problem of values in a postmodern world has nothing to do with nihilism because the problem of values is not, as we so habitually and automatically assume, one of locating sources and deriving definitions. *That* problem, as Merleau-Ponty suggests, is solely the product of denial—denial of our finitude, our mortality, our humanity: "The adhesion to an infinite positivity is a pseudonym for naked anguish—the pretention to have crossed the negative and reached the other shore, to have exhausted, totalled up, internalized death."<sup>66</sup> Rather, the problem of values is one of learning to rediscover their locus in our practices and commitments. There is no other basis for our values than our own committed actions.<sup>67</sup> Without that ground, there are no foundations and no values worth speaking of. Besides, as Merleau-Ponty observes, "[t]he idea of a fortuitous humanity which has no cause already won is what gives absolute value to our *virtue*."<sup>68</sup>

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64. "[T]he moral intuitions of the average middle-class member of a modern Western society are contingent, fragile, precious creations, not the expression of something universally human." Richard Rorty, *Thugs and Theorists: A Reply to Bernstein*, 15 POL. THEORY 564, 579 n.28 (1987).

65. As Taylor reminds us, this "availability" is only a matter of logical conceivability unless those values also make sense within the practices and forms of life of the receiving culture. *See supra* text accompanying notes 20-27. In the case of India, China, and Mexico (the respective home countries of these three philosophers), the penetration and extension of Western culture generally makes such liberal Western values increasingly fitting.

66. MERLEAU-PONTY, *supra* note 1, at 29.

67. *See Cover, supra* note 38, at 45 ("The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken.")

68. MERLEAU-PONTY, *supra* note 1, at 219.